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CORRECTED COPY

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1014

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM A. KUBRICK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR WILLIAM A. KUBRICK, RESPONDENT.

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OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit Court affirming the action of the District Court (Pet. App. 1a-14a) is reported at 581 F. 2d 1092. The opinion of the United States District Court for the Eastern District of Pennsylvania, granting relief to the respondent (Pet. App. 15a-70a), is reported at 435 F. Supp. 166.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petitioner's brief.

QUESTION PRESENTED.

Does a medical malpractice claim under the Federal Tort Claims Act accrue when the plaintiff learns of all elements of his claim i.e. injury, causation, the duty owed to him by the defendant and the breach of that duty where (1) plaintiff is hindered by the defendant from learning all of these elements and (2) the medical causation question is technically complex.

STATUTORY PROVISION INVOLVED.

28 U. S. C. 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing by certified or registered mail of notice of final denial by the agency to which it was presented.

STATEMENT.

This is a malpractice action initiated by William A. Kubrick, a disabled Korean War veteran, for injury he suffered because of a severe hearing loss and resultant speech impairment caused by negligent post-operative leg wound irrigation treatment with a solution of neomycin sulfate (Pet. App. 38a).[1]

The medical treatment and procedures which caused the loss and impairment of the respondent's hearing were administered under the direction of the United States Veterans Administration physicians at the Wilkes-Barre Veterans Hospital, Wilkes-Barre, Pennsylvania (Pet. App. 37a).

An action was filed by Kubrick on September 14, 1972 in the United States District Court for the Eastern District of Pennsylvania under the Federal Tort Claims Act, 28 U. S. C. 1346, for the profound damage he suffered as a result of the aforementioned malpractice (Pet. App. 30a; A. 5-6).

The case was tried before the Honorable Edward J. Becker of the United States District Court, sitting without a jury.

The facts, as adduced at trial and as found by Judge Becker,[2] are as follows: William Kubrick entered the

1. "Pet. App." shall hereinafter refer to citations to the Appendix to the Petition for a Writ of Certiorari; "A." shall hereinafter refer to citations to the Appendix to the Briefs; "R" shall hereinafter refer to citations to the Record in the District Court.

2. The facts, as found by the District Court, were specifically affirmed by the United States Court of Appeals for the Third Circuit (Pet. App. 12a). The United States Supreme Court ordinarily does not undertake to review concurrent findings of fact by two courts below in the absence of an obvious and exceptional showing of error. *Graver Tank and Manufacturing Co., Inc. v. Linde Air Products Co.*, 336 U. S. 271 (1949); *Graver Tank and Manufacturing Co. v. Linde Co.*, 339 U. S. 605 (1950); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U. S. 630 (1966); *American Federation of Musicians v. Carroll*, 391 U. S. 99, 105 (1968). See also F. R. C. P. 52(a). Nowhere in its Brief to this Court nor in the Petition for Writ of Certiorari does the Government allege or argue that the findings below are possessed of obvious or exceptional error. Because of this Court's reluctance to review factual findings where both lower courts concur, and in light of the fact that the Government does not oppose those findings, the findings of the District Court control this case. Therefore, the factual statement of the case will be to the findings of Honorable Edward J. Becker of the District Court for the Eastern District of Pennsylvania. This Court should consider only Judge Becker's factual findings in the review of this case.

Wilkes-Barre Veterans Administration Hospital on April 2, 1968 for treatment of a bone infection (osteomyelitis) of his right leg (Pet. App. 21a). On his admission to the Hospital Kubrick's hearing was normal (ibid.). After surgery on the affected leg Dr. H. Parker Wetherbee,[3] a Veterans Administration Hospital physician, ordered that a 1% solution of an antibiotic, neomycin, be used to irrigate the surgical wound. The wound was irrigated by using a system of hemovac tubes with the antibiotic solution for twelve to thirteen days (Pet. App. 22a). The respondent was discharged from the Veterans Administration Hospital on April 30, 1968; when the osteomyelitis cleared (ibid.).

In mid-June 1968, respondent noticed both a hearing loss and ringing in his ears (tinnitus) (Pet. App. 23a). To determine the cause of his hearing impairment, Kubrick saw several physicians and hearing specialists, including J. J. Soma, M.D.; none of these physicians could edify Kubrick as to the etiology of his hearing problems (ibid.). Kubrick eventually saw Joseph Sataloff, M.D., a hearing specialist in Philadelphia, in November 1968 who diagnosed Kubrick's problem as bilateral nerve deafness (ibid.). Dr. Sataloff informed the respondent that it was "highly possible" that his deafness was caused by the

3. Dr. Wetherbee died in 1969 (R. I 29-30).

neomycin solution administered at the Wilkes-Barre Veterans Administration Hospital (Pet. App. 24a).[4]

Kubrick continued to be treated by Dr. Sataloff until the summer of 1971 (ibid.). At no time did Dr. Sataloff ever advise or indicate in any way to the respondent that the neomycin had been negligently administered (Pet. App. 24a-25a). Consequently, the District Court found explicitly "it was reasonable for plaintiff to continue to believe, even after consultation with Dr. Sataloff, that his deafness was not the result of malpractice in view of the technical complexity of the question whether his neomycin treatment was unduly hazardous." (Pet. App. 25a).

After his consultation with Dr. Sataloff, Kubrick, who had only a grade school education (A. 99) and whose vocation was that of a maintenance mechanic (Pet. App. 41a), sought increased disability benefits from the Veterans Administration (Pet. App. 24a). On April 16, 1969, Kubrick enlisted the aid of Peter Dudish, a representative of the Disabled American Veterans in Wilkes-Barre, to complete the claim form for increased benefits for the respondent's hearing loss (A. 70-71). This request for an increase in benefits was sought by Kubrick solely because Dr. Sataloff told him that his hearing loss had been caused by neomycin and not because Kubrick had any idea that negligence was involved in the method of the neomycin administration (Pet. App. 29a).[5]

4. The Government in its Statement on page 4 of the Brief states that "Dr. Sataloff told respondent that the VA's administration of neomycin had caused his hearing loss." The finding of the District Court was that Dr. Sataloff had told the respondent ". . . that it was 'highly possible' (or other similar language) that the hearing loss was caused by the neomycin solution . . ." (Pet. App. 24a). See also Government's Brief p. 4, n. 1. The District Court's finding on this point is controlling here. See Note 2 of this Brief, *supra*.

5. Kubrick believed he was entitled to an increased disability allowance as a result of the neomycin treatment even if there was

In August 1969, the Veterans Administration Board of Physicians, which was composed of three Veterans Administration physicians, Dr. H. Stuart Irons, Chief, Surgical Service; Dr. Milton Kantor, Chief, Medical Service; and Dr. Edward R. Jarjigian, Chief, Psychiatry and Neurology Service denied Kubrick's claim (Pet. App. 25a; A. 13-14). The Board of Physicians in direct contradiction of Dr. Sataloff's statement of the probable connection between neomycin and deafness, informed Kubrick that they found no causal relationship between the hospital's use of neomycin and the hearing loss, because such hearing loss is associated only with systemic use of neomycin. Even though Kubrick at no time raised the issue, the VA also declared that there was no evidence of carelessness, accident, negligence, or lack of proper skill, error in judgment, or any other fault on the part of the Veterans Administration (Pet. App. 25a).

The August, 1969 denial of increased benefits and the denials of causation and malpractice were only the first in a long and persistent series of denials of causation and liability by the Veterans Administration (Pet. App. 25a-29a). The myriad VA officials and physicians sitting in judgment on Kubrick's case from 1969 until the final denial of respondent's claim in April, 1973 consistently and tenaciously held to their position that there was no negligence on the part of the VA doctors and that there was no

5. (Cont'd.)
no fault on the part of the VA; since he knew that a veteran was entitled to receive benefits for injury that occurred on active duty without regard to fault and he believed the same rule applied when a veteran was injured while a patient in a government hospital (Pet. App. 11a, A. 82-83). Kubrick was not aware that to get benefits under 38 U. S. C. 351 and its applicable regulations, 38 C. F. R. 3.358(c)(3); he had to show that the VA physicians were negligent (ibid.).

causal connection between the use of neomycin, the method of its application and the respondent's hearing loss (ibid.).

William Kubrick, after the initial denial of his request for increased VA benefits, wrote numerous letters and requests to several government agencies and various dignitaries, continuously asking that the Veterans Administration acknowledge the causal connection between his hearing loss and neomycin (Pet. App. 28a).[6]

On September 5, 1969, an Adjudication Officer in the Veterans Administration Center in Philadelphia advised the respondent that the Veterans Administration had found that his hearing loss was not related "medicinally or medically to his April 1968 hospitalization." (Pet. App. 25a-26a; A. 15).

In a "Statement of Case" issued on September 26, 1969, responding to Kubrick's request for further review, the Veterans Administration for the third time denied the claim because they could find neither a causal connection between the neomycin and his deafness, nor a showing of negligence or carelessness on the part of the VA (Pet. App. 26a; A. 16-20).

Kubrick continued to pursue his claim. After a hearing before the Board of Veterans Appeals, consisting of John G. Riggins, M.D., I. Kleinfeld and J. L. Ray, the Board remanded Kubrick's case for further investigation (A. 23-29). In the course of this investigation, Dr. J. J. Soma was interviewed by the Veterans Administration

6. The Government at page 7 of its brief cites a portion of one of the letters written by Kubrick. The District Court has decided that the aforementioned letters present only a "flurry of rhetoric induced by desperation" (Pet. App. 28a). The Court further stated, "We credit plaintiff's testimony that he did not, prior to his June 1971 interview with Dr. Soma, suspect that there was negligence involved. We find that as of the date of those letters plaintiff believed his entitlement to VA benefits followed if the neomycin administration caused the hearing loss without negligence." (ibid.).

(Pet. App. 26a-27a; A. 30-31). According to the VA investigator, J. A. Nagy, Dr. Soma stated that Kubrick's deafness resulted from his employment in a machine shop (ibid.). Mr. Nagy's report on his interview with Dr. Soma was sent to Kubrick by the VA as a Supplemental Statement of Case (ibid.).

The respondent confronted Dr. Soma with this report and Dr. Soma denied having made the statements attributed to him by the VA (Pet. App. 27a). On June 2, 1971, Dr. Soma told Kubrick that neomycin absorption in his system had caused his hearing loss and that the neomycin should never have been used (Pet. App. 27a-28a).

Prior to his being told by Dr. Soma that the VA physicians erred in the administration of neomycin, Kubrick's belief that no malpractice was present was reasonable because of the technical complexity of whether the neomycin treatment involved excessive risks, failure of any of the doctors Kubrick consulted prior to June 1971 to suggest or reveal the possibility of negligence, and the repeated, unequivocal assertions by the VA that there was no negligence on the part of the Government (Pet. App. 29a).

Again, on August 9, 1972, the Board of Veterans Appeals, by H. J. Schlegel, John G. Higgins, M.D. and I. Kleinfeld, denied the claim saying that there may have been a causal connection between the neomycin administration and Kubrick's defective hearing, but continuing to deny that there had been any negligence (Pet. App. 30a; A. 40-48).

The respondent's administrative claim (Form 95) was rejected in a letter to respondent's counsel on April 13, 1973 (Pet. App. 30a; A. 49-50).

On July 15, 1975, the VA, sua sponte, reconsidered its earlier decisions on Kubrick's petition and granted respondent proper benefits; the decision to reverse the ear-

lier denials was based on the fact that those earlier decisions had been "clearly and unmistakably erroneous" (Pet. App. 30a-31a; A. 51-55).

On July 22, 1977 Honorable Edward J. Becker filed an opinion in which he found:

> (1) the action was prosecuted within the applicable statute of limitation because the claim did not accrue until Kubrick knew all the elements of his cause of action, i.e. duty, breach, causation and injury
>
> (2) the VA physicians were negligent in the method of administration of neomycin to Kubrick
>
> (3) the neomycin administration was causally connected to the respondent's deafness, and
>
> (4) the Government was liable to the plaintiff for hearing loss damages in the amount of $320,536.00.

The District Court in deciding that Kubrick's claim did not accrue until he knew that the medical treatment had been negligently administered began its discussion with the *Quinton v. United States*, 304 F. 2d 234 (5th Cir. 1962) "discovery rule" and the *Urie v. Thompson*, 337 U. S. 163 (1949) "blameless ignorance" rule. The District Court found the Government's reading of *Quinton* to be "simplistic and conceptually inaccurate" (Pet. App. 50a). Judge Becker further declared that where the patient determines the relationship between treatment and injury, but even after diligent efforts, still has no reason to think that there was negligence in his treatment, the statute does not begin to run.

The District Court held that the *Quinton* test created a rebuttable presumption that knowledge of the causal relationship between treatment and injury is enough to alert a reasonable person that there may have been negligence related to the treatment (Pet. App. 51a).

The Court declared that Kubrick rebutted this presumption and could not be said to have known of negligence until June, 1971, when Dr. Soma told him that he had been treated improperly in the administration of neomycin (Pet. App. 61a). Kubrick's claim, then, according to the District Court did not accrue until June, 1971. His complaint was filed in the District Court on September 14, 1972, within the applicable period of the statute of limitations from the time of accrual of his cause of action.[7]

7. The District Court reasoned, in response to the Government's objection to Kubrick's failure to file his administrative claim under 28 U. S. C. 2675(a) before his institution of District Court action, that since the administrative claim was filed on January 13, 1973, and rejected on April 13, 1973 within the statute of limitations, 28 U. S. C. 2675(a) had been substantially complied with. Judge Becker could see no reason to force Kubrick to refile a complaint which was already before the Court, in order to technically comply with 28 U. S. C. 2675(a) (Pet. App. 61a-62a, n. 23). The court said, "To hold otherwise would be to elevate form over substance and erroneously presume a legislative intent to bar a plaintiff's complaint purely because he did not go through the technical procedure of raising a complaint which was already before the Court." (ibid.). The Government did not preserve its argument on 28 U. S. C. 2675(a) either in the Court of Appeals nor has that issue been raised in This Court. The Court of Appeals, sua sponte, dealt with the issue of filing of the administrative claim, "We agree with the District Court's conclusion that where the administrative claim is denied before any substantial progress has been made in the pending litigation the suit need not be refiled to be effective." (Pet. App. 13a). The sole question for resolution by this Court is the determination of when a "claim accrues" in a medical malpractice action under the Federal Tort Claims Act. The Government should be precluded from arguing the issue as to the administrative appeal under 28 U. S. C. 2675(a) by indirection or otherwise. That question has been decided and has not been properly raised before this Court either in Petition for Certiorari or in the Government's Brief. For purposes of this appeal, the determination of both the District Court and the Court of Appeals, that the filing of the administrative claim and the refiling of the lawsuit would have been an empty gesture and an elevation of form over substance, controls.

The Government appealed to the United States Court of Appeals for the Third Circuit; that Court substantially affirmed both the findings of fact and the conclusions of law of the District Court.[8]

The Third Circuit found that Kubrick's claim did not accrue until he discovered that there was negligence involved in the administration of neomycin. The Court declared that in many cases, knowledge of the causal connection between treatment and injury should alert a reasonable person that there had been malpractice. However, in other instances where knowledge of the causal connection does not lead a reasonable person to believe that there has been negligence, a different rule must apply. In those situations, if the plaintiff can show he exercised diligence but still did not know that the treatment was improper; then the statute of limitations does not begin to run until the plaintiff learns of the breach of duty (Pet. App. 10a). The Third Circuit found that Kubrick knew of two of the essential elements, causation and damages; he did not know of the breach of duty until he was told of the negligence by Dr. Soma (Pet. App. 12a). That Court declared after discussion of its proposed rule, that "Any other result would be inequitable and contrary to the 'blameless ignorance' rationale underlying the *Quinton* discovery rule." (Pet. App. 10a).

The Government then petitioned for a Writ of Certiorari to the Third Circuit on the sole issue of when Kubrick's claim accrued, under the Federal Tort Claims Act. This Court granted the Government's request for certiorari on that issue on February 21, 1979 (A. 145).

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8. The Third Circuit remanded the case solely to set off augmented Veterans Administration benefits from the District Court's damages award, pursuant to 38 U. S. C. 351 (Pet. App. 13a-14a).

SUMMARY OF ARGUMENT.

The issue for determination is when does a medical malpractice claim "accrue" under the provisions of Federal Tort Claims Act. To ensure compliance with the purposes of that Act and to ensure equitable treatment, a claimant must discover all aspects of his cause of action; injury, causation, duty and breach of that duty before a claim can be said to have accrued.

Medical malpractice claims are often technically complex and supporting evidence is not readily accessible to the layman. Claimants are often stymied in their attempts to provide such expert interpretation because of the conspiracy of silence i.e. that physicians are generally unwilling to reveal either their own or a colleague's malpractice. In this case, in fact, the Veterans Administration, its physicians and private physicians prevented the respondent from discovering both the causation of his injury and the malpractice involved.

There is no definition of "accrual" in the FTCA or its legislative history and, therefore, there must be an interpretation within the context of the purposes of that Act. The FTCA was created to provide a remedy for victims of the negligence of governmental employees in a uniform and fair way. The United States is liable in the same way as a private person would be.

The ordinary meaning of accrual is "to vest as a right." To ensure that the FTCA purposes are complied with in technical medical malpractice cases, "accrual" must be interpreted to include all aspects of a cause of action—injury, causation, duty and breach of duty. None of the purposes of the statute of limitations are thwarted when these elements must be discovered before an action accrues. The respondent was not sleeping on his rights—he was not aware of them. The claim was not false, fraudulent,

tenuous or frivolous—only extremely difficult for a layman to comprehend without expert aid. The Government lost no evidence and was not prejudiced because this lawsuit was brought shortly after discovery of malpractice.

The blameless ignorance rule of *Urie v. Thompson* governs this case and requires that blameless ignorance be defined to include knowledge of malpractice as well as causation and injury. The purpose of the *Urie* rule is to eschew depriving a right to one who is ignorant of that right. *Quinton v. United States*, which specifically deals with a discovery rule in a medical malpractice case adopts the *Urie* "blameless ignorance" doctrine. To limit *Quinton* only to discovery of causation and injury is to interpret that rule too narrowly which would punish the blamelessly ignorant—a result never intended by the *Quinton* court.

Since the issues in this case are medically complex and the respondent was effectively precluded by the VA, its physicians and other doctors from learning both the cause of his harm and the conduct of his treating physician, the reasoning of the court of appeals in requiring knowledge of negligence is based on sound legal and equitable principles supported by the case law cited in this Brief.

ARGUMENT.

A. The Uniqueness of Complex Medical Malpractice Actions Must Be Considered in Determining When a Cause of Action Accrues Under the Federal Tort Claims Act.

In describing the liability of the United States for the negligence of government employees, 28 U. S. C. 2674 states in pertinent part:

> The United States shall be liable respecting the provisions of this title relating to tort claims in the same manner and to same extent as a private individual under like circumstances . . .

In vesting jurisdiction in the United States District Courts, Congress also mandated in 28 U. S. C. 1346 that the district courts

> . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

United States v. Brown, 348 U. S. 110 (1954) held that medical malpractice claims were among the torts that Congress meant to include within the coverage of the Federal Tort Claims Act (hereinafter FTCA).

The plaintiff in a medical malpractice case however, is in a different position from the usual FTCA claimant

in his ability to discover and to act on his claim for several reasons. In most actions prosecuted under the FTCA, the claimant is aware of the likelihood of negligence coincidentally with his awareness of his injury. Unfortunately, in the medical malpractice area, the existence of the injury, its causation, and the negligence of the medical practitioner may all elude the claimant. Questions of causation are difficult to comprehend, as are questions of duty and breach of that duty. The plaintiff must grasp the medical complexities of the cause of his injury and, further, must understand that malpractice was involved in his treatment. To acquire knowledge relating to causation and malpractice, the claimant must rely on medical advice unless they are easily identifiable. In the difficult case, absent such expert advice, the plaintiff remains ignorant of whether his cause of action is viable.

Laymen, generally, do not possess the expertise to understand complex medical malpractice problems. There is an awareness by the courts of the lack of expertise of laymen in understanding medical problems. Consequently, in the trial of the majority of medical malpractice cases, expert medical testimony is necessary to establish causation and to show violation of the medical standard of the community where the alleged malpractice occurred. W. Prosser, *Handbook of the Law of Torts*, 3rd ed. 167 (1964). Without the expert medical witness as interpreter, most medical terminology would be meaningless to a jury. Like the jury, potential malpractice claimants are dependent upon physicians to aid them in determining whether there is a cause of action. Unfortunately, the quest for a physician who will reveal either his own or a colleague's malpractice is a difficult one.[9] Physicians

9. Markus, Richard M., *Conspiracy of Silence*, 14 Clev.-Mar. L. Rev. 520 (1964); W. Prosser, *Handbook on the Law of Torts*, 167 (1964).

more often will either whitewash another physician's negligent acts or fail to reveal those acts at all to a patient. Many acts of malpractice go undisclosed, while others may not be divulged until a time after the expiration of the statute of limitations. The failure to reveal malpractice is present in the record in the case sub judice to an alarming degree. See Section E of this Brief, *infra*.

Medical records, too, are often inaccessible to the claimant. Most states do not allow distribution of medical records to patients, absent their being subpoenaed for litigation purposes. Tucker, *Patient Access to Medical Records*, Legal Aspects of Medical Practice, 45, 48-49 (Oct., 1978). Even if the patient could interpret and understand his own medical records, he could probably not gain access to them unless he had already begun litigation. The patient must depend on a physician to obtain his records and to interpret them. If no physician is willing to obtain and interpret these records, a person may be precluded from knowing that malpractice was involved in his treatment.

In cases of adverse drug reactions, as in this case, claimants are dependent upon physicians for guidance as to causation questions and as to questions of whether or not there has been impropriety in the drugs used and/or their administration. The patient often does not even know the correct questions to ask, if he suffers an adverse drug reaction. Questions which probably should be asked are as follows: (1) Is the adverse result of the drug a lesser evil than what the result might have been without treatment? (2) Is the cause of action against the drug company for production of a defective product? (3) Was the administration of the drug negligent because the drug was given incorrectly, or because the dosage was too large or too small? (4) Is there a cause of action against a physician for negligence in administering the drug? All of

these questions and more, if a layman can formulate them, require expert opinion to determine whether or not there is a cause of action. If the potential claimant does not find a medical expert who is willing to help formulate questions and who will answer those questions candidly, a claim may be foreclosed by the statute of limitations through no fault of the claimant's, but only because of his blameless ignorance.

The claimant, who is not aware of all the elements of his medical malpractice claim, is ill-advised to bring such an action; particularly in light of recent cases brought by physicians against both plaintiffs and their attorneys, some of whom rushed to sue before they were sure of a viable right. Such actions include defamation, malicious prosecution, abuse of process and in some cases, prima facie tort: See Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 Fordham L. Rev. 1003 (1977); *Drago v. Buonagurio*, 402 N. Y. S. 2d 250 (1978). The attorney who brings a lawsuit when he knows only injury and causation but is not sure of malpractice may also be subject to professional disciplinary proceedings. He would be knowingly advancing a claim which is not warranted under the law. ABA Code of Professional Responsibility, DR-7-102(A)(2).[10]

Since claimants in complex medical malpractice cases have a difficult task in determining all aspects of the cause

10. The government suggests at pages 19 and 32 of its Brief that the plaintiff could file suit after knowledge of causation and injury and utilize discovery techniques to understand the technical complexity of his claim and to determine whether there has been medical malpractice. Adopting such a tactic would subject both claimants and attorneys to actions for defamation, prima facie tort, malicious prosecution or abuse of process. Such hasty filing of suit before all aspects of a cause of action are known could very well subject attorneys to disciplinary proceedings under the ABA Code of Professional Responsibility.

of action, the statute of limitations rule which governs the FTCA must allow the plaintiff to discover all elements of his cause of action: injury; causation, duty, and breach of that duty. Such a rule is consonant with the purposes of the FTCA, the history of the Act, and the purposes of a statute of limitations.

B. After Balancing the Purpose of the Federal Tort Claims Act, to Provide a Remedy to Victims of Negligence, With the General Purposes of the Statute of Limitations to Prevent Stale Claims; a Claim Must Be Considered to Accrue When the Victim of Medical Malpractice Discovers Injury, Causation, Duty and Breach of That Duty.

1. When "Accrues" Is Defined in the Context of the General Purposes of the FTCA, to Compensate in a Uniform Way the Victims of the Negligence of Government Employees, a Claim Accrues at Such Time the Plaintiff Learns All Aspects of His Cause of Action—Injury, Causation, Duty, and Breach of That Duty.

The statute of limitations under the FTCA is contained in 28 U. S. C. 2401(b), which provides in pertinent part,

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues.

The question of statutory interpretation for this Court, then, is when does a claim accrue in a medical malpractice case under the FTCA.

The standard for interpreting the FTCA was set forth in *Indian Towing Co. v. United States*, 350 U. S. 61 (1955).

There, the Supreme Court recognized both a duty of strict statutory construction of a statute which abrogates sovereign immunity, along with the duty to interpret the statute so as not to make the abrogation of immunity more narrow than Congress intended. There is no definition of when a "claim accrues" in the Act itself, 28 U. S. C. 2401(b). The sparse and sketchy legislative history of the FTCA, a part of the Legislative Reorganization Act of 1946, is of no help in determining what Congress meant by "accrues" or in determining Congress' attitude toward the statute of limitations [11]; likewise the legislative history of the amendments to the FTCA are no aid.[12]

11. The legislative history of the Legislative Reorganization Act of 1946 is contained in S. Rep. No. 1400, 79th Cong., 2d Sess. (1946). The history of the Federal Tort Claims Act comprises four pages (*ibid.*, 29-33). Nowhere in the legislative history of the 1946 Act is there any clue as to the intent of Congress with respect to the statute of limitations or any information as to Congress' view of the definition of "accrual". The legislative history contains only a paraphrase of 28 U. S. C. 2401(b) (*id.* at 33). Although myriad bills to abrogate sovereign immunity in tort were proposed and defeated, proposed and tabled, or vetoed prior to the passage of the 1946 Act; none of the legislative history of the earlier bills was incorporated in the legislative history of the FTCA. *United States v. Yellow Cab*, 340 U. S. 543 (1950). See also Note, *The Federal Tort Claims Act*, 56 Yale L. Rev. 534 (1947). Since none of the legislative history of the earlier proposed Acts is included in this Act, the legislative history of earlier defeated Acts, is of no significance or force. See *United States v. Yellow Cab, supra.* The legislative history which has lost its significance because it has not been incorporated in the legislative history of the FTCA is H. R. Rep. No. 2800, 71st Cong. 3rd Sess. 5 (1931), Hearings on H. R. 5065 before the Subcomm. of the House Comm. on Claims, 72nd Cong. 1st Sess. 14 (1932), 67 Cong. Rec. 11087 (1926) (remarks of Rep. Underhill); the Government relies on the above-mentioned history in its Brief at pages 23-24.

12. In 1949 in 63 Stat. 62, Congress extended the statute of limitations in the Federal Tort Claims Act from one year to two years. The legislative history of that statute sheds no light on the meaning of accrual. H. R. Rep. No. 276, 81st Cong., 2nd Sess. (1949). That history speaks of only extension of the *statute of limitations* to two years, so that the one-year period would not work

There is no definition of "accrues" either in the Act itself or in the legislative history of the FTCA; therefore, it is for the courts to establish a definition of accrual of a claim in accord with the general purposes of the Act and in the context of those purposes. *United States v. American Trucking Associations, Inc.*, 310 U. S. 534 (1940).

Congress' general purpose in enacting the FTCA was to provide a remedy to those who had been without because the negligence they suffered from had been inflicted by governmental employees. S. Rep. No. 1400, 79th Cong. 2d Sess. 30 (1946): *Feres v. United States*, 340 U. S. 135, 139-140 (1950). Congress was also mindful that the public treasury could more readily deal with such losses than could the private individual who might be left destitute and grievously harmed: *Rayonier v. United States*, 352 U. S. 315 (1957). Congress apparently decided that that loss occasioned by harm caused by governmental employees should be spread among the taxpay-

12. (Cont'd.)
an injustice on those whose injuries had not fully developed until after the one year statute expired (*ibid.*). In effect, the report discusses only the time after accrual of action and seems to relate to the extent of injuries rather than knowledge of elements of a cause of action.

The 1966 Amendments to the FTCA, 80 Stat. 307 are neither relevant to the statute of limitations nor do they aid in defining when a claim accrues. Failing to find any definition of when a claim accrues under FTCA in the legislative history of the 1966 Amendments, the Government looks to an Act passed the same day as those amendments for aid. That Act, 28 U. S. C. 2415 and 2416 created a statute of limitations on suits by the government where no such limitation had existed before. Certainly the policies underlying the FTCA are different from the policies underlying 28 U. S. C. 2415 and 2416. Secondly, neither the statute of limitations nor the definition of accrual under the FTCA was even under consideration by the Congress that passed 28 U. S. C. 2415 and 2416. The fact that 28 U. S. C., 2415 and 2416, passed by the Congress in 1966, contain exceptions to general statute of limitations language is of no relevance as to what the 79th Congress meant by accrual or what Congress' view of the statute of limitations was in 1946.

ers since the taxpayers benefit from the work of the governmental employees—(id. at 319-320). Further, the statute was designed to make the perpetrators of negligence in the operation of governmental activities, liable in the same way as a private person would be liable. *Indian Towing Co. v. United States*, 350 U. S. 61 (1955).

Another purpose in Congress' passage of the FTCA was to do away with the arbitrary, non-uniform private bill system for granting relief to victims of the torts of governmental employees and to replace that system with a uniform and fair method of compensating victims of governmental negligence. Note, *The Federal Tort Claims Act*, 56 Yale, L. Rev. 534 (1947).

According to Black's Law Dictionary, 4th Ed. 37 (1968), the word "accrue" is derived from the Latin "ad" and "creso"—to grow to . . . A cause of action accrues whenever a suit may be maintained thereon; whenever one person may sue another." (citations omitted). The first meaning of "accrue" in *Webster's Third New International Dictionary of the English Language*, unabridged, 1969, p. 13 is "to come into existence as an enforceable claim; vest as a right <a cause of action has accrued when the right to sue has become vested>."

Congress certainly had the option in defining a period of limitations under the FTCA to use language other than "accrues" in determining when the statute begins to run. Congress could have created a limitation of action to commence the statute from the date of the injury, the date of the accident, the date of the discovery of the injury, the date of discovery of the injury and causation, or the coalescing of the date of discovery of the injury, causation, duty to the plaintiff, and breach of that duty, as found by the courts below. In using "accrues", Congress used a word which would permit a flexible interpretation of the

statute of limitations by the courts. This is particularly true where "accrues" is nowhere satisfactorily defined in the FTCA itself or explained in the legislative history.

It is submitted that a litigant does not know that his right to sue has matured until he knows there has been negligence and until he knows that injury has been perpetrated on him and by whom. The ordinary meaning of accrual requires that a plaintiff know injury, causation, duty, and breach of duty.

2. The General Purposes of the FTCA Must Be Balanced With a Statutes of Limitations Policy to Develop a Definition of Accrual That Is Equitable to Plaintiffs and Defendants.

Congress was probably mindful of general statute of limitations policies when it included 28 U. S. C. 2401(b) in the FTCA. Under those policies, the defendant has the right to be protected from stale, tenuous, frivolous and fraudulent claims. This is particularly true when evidence is lost and memories have faded. *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950).

The purposes of the FTCA, the general purposes of the statute of limitations and the meaning of the word "accrual" must all be considered in determining when the statute of limitations begins to run. In determining what Congress meant by accrual, it is necessary to balance the general purposes of the FTCA against the purposes of the statute of limitations provisions in that Act.[13]

In a case such as the one at bar, where there are complex medical malpractice issues and where a plaintiff has been misled as to whether he has a cause of action at all,

13. See also *Lopez v. Swyer*, 62 N. J. 267 (1973) and *Yoshizaki v. Hilo Hospital*, 433 P. 2d 220 (Sup. Ct. Hawaii 1967) for similar balancing tests under state law.

the interest of the defendant in the statute of limitations pales in comparison with the policy of granting the plaintiff the right to recover in tort against government employees.

The respondent knew it was "highly possible" that neomycin was related to his deafness in November, 1968 (Pet. App. 24a). Under the Government's definition of accrual, the respondent's right of action would be barred before he learned in 1971 that his hearing loss resulted from improper use of neomycin (Pet. App. 27a-28a). Under the Government's definition of "accrual" the respondent would be barred from asserting a claim even before he knew he had a cause of action. Such an interpretation of "accrual" would be absurd,[14] particularly in light of Congress' intent under the FTCA to provide a remedy to tort claimants and in light of the Congressional intent to provide a uniform, equitable system to compensate such claimants. See Section B. 1. of this Brief, *supra*. Absurd results are to be eschewed in statutory construction. *Commissioner v. Brown*, 380 U. S. 563, 571 (1965).

The next inquiry in the balancing test between the general purpose of the FTCA to grant relief to an aggrieved plaintiff in a complex medical malpractice case, and the purposes of the statute of limitations, is to determine whether the defendant has been prejudiced by the delay in filing suit. In this case, the answer is soundly no. The defendant has the right to be protected from stale, false, and fraudulent claims, and to be protected from having to defend a lawsuit where witnesses have been lost and memories have faded.

The claim asserted by Kubrick was not stale; as a matter of fact, because of the plaintiff's persistence, the

14. See *Berry v. Branner*, 421 P. 2d 996, 998 (Sup. Ct. Ore. 1966); *Rosane v. Senger*, 149 P. 2d 372, 375-376 (Sup. Ct. Col. 1944).

claim was fresh in the minds of the Veterans Administration up until the time he instituted suit, in September, 1972 (Pet. App. 24a-29a). Kubrick put the VA on notice as early as April 1969 that he was deaf as a result of the treatment he received at the Wilkes-Barre VA Hospital in April, 1968 (Pet. App. 24a).

Far from sleeping on his rights, Kubrick was intent on enforcing those rights he believed he had (Pet. App. 24a-29a). When he learned he had the right to sue the Government, he promptly pursued that right as well.

It is extremely doubtful that any evidence was lost in this case. The VA obviously relied on medical records from Kubrick's 1968 hospitalization in order to refute his contentions as to causation (Pet. App. 24a-29a). Nowhere does the government allege that evidence has in fact been lost. The Government does state that H. Parker Wetherbee, Kubrick's treating physician at the VA, was dead before suit began. This argument is of no support to a claim that evidence was lost, since Dr. Wetherbee died in 1969 (R. I-29). Even under the Government's definition of accrual, Wetherbee would have been unavailable for trial in 1970; when the Government contends the statute of limitations should have run.

Though a statute of limitations can prevent false, fraudulent and frivolous claims, the Government has never contended that the profound deafness from which Kubrick suffers is in any way false, fraudulent or frivolous.

None of the evils a statute of limitations is designed to protect against are present in this case. The VA knew of Kubrick's claim within one year of his operation; they knew the claim was genuine; and they relied on their medical records to refute his claim of causation between neomycin and deafness.

The equities of this balancing test favor the plaintiff. He put the VA on notice of his possible claim even before

he knew the treatment which caused his deafness was negligent. To penalize him by barring his right to sue before he knew he had a claim, when none of the reasons underlying the statute of limitations are here, would be inequitable and unconscionable, and would thwart the general purposes of the FTCA; i.e., to grant remedies to injured plaintiffs in a uniform way.

C. This Court's Rule of "Blameless Ignorance" Governs This Case and Requires Accrual of the Cause of Action in Medical Malpractice Cases After Knowledge of Injury, Causation, Duty and Breach of Duty.

The "blameless ignorance" doctrine was first enunciated in the case of *Urie v. Thompson*, 337 U. S. 163 (1949). In that case Urie instituted suit in the Missouri state courts under both the Federal Employees Liability Act, 45 U. S. C. 51 et seq. (1940 ed.) and the Boiler Inspection Act, 45 U. S. C. 23 et seq. He was granted judgment in the amount of $30,000.00 under the Boiler Inspection Act. The railroad appealed on the ground that the statute of limitations had run years before his institution of suit.

Urie was first exposed to silica dust in 1910 while employed by the railroad and was exposed continuously until 1940. He inhaled the dust while working in the cabs of locomotives. In 1940 he ceased working because of a pulmonary disorder, diagnosed then as silicosis. Urie brought suit in 1941. This Court in *Urie* held that the railroad worker's cause of action did not accrue until 1940, when he was diagnosed as having silicosis. Urie filed suit well within the three year limitations period specified by the Federal Employers Liability Act. The *Urie* court held that the traditional purpose of a statute of limitations is to "*require the assertion of claims within a specified period of time after notice of the invasion of legal rights*" (emphasis added) *Urie v. Thompson, supra* at 170.

Had the *Urie* court barred the railroad worker's claim, he would have been denied his right to bring suit against his employer, solely because he had not discovered his "unknown and inherently unknowable disease" earlier. *Urie v. Thompson, supra* at 169. The Court declared that "We do not think the humane legislative plan (of the FELA) intended such consequences to attach to blameless ignorance." (*id.* at 170).[15]

Even though, in Urie's case, the cause of action began to accrue when Urie learned of his ailment and its relationship to his employment, the policy of the *Urie* case can and should be read more broadly to include situations where any component of a cause of action is "unknown" and "inherently unknowable" to the potential litigant. In *Urie*, the diagnosis of silicosis informed the plaintiff of the harm. Inherent in the diagnosis, too, is the inference of negligence on the part of the railroad in permitting its employees to breathe the silica dust, without any safeguards.[16]

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15. The purposes of the FTCA indicate that the Congress in enacting that legislation also had a humane legislative plan in mind; to provide uniform compensation for victims of tortious conduct by government employers. *Feres v. United States*, 340 U. S. 135, 139-140 (1950); *Rayonier v. United States*, 352 U. S. 315, 319-320 (1957); *Indian Towing Co. v. United States*, 350 U. S. 61 (1955). See also Section B, *supra* of this Brief for a more detailed statement on the purposes of the Act.

16. The Government argues in its Brief at page 29 that no one had to tell Urie that there was "negligence" before he filed his claim. The Government further says that once one knows the connection between injury and causation, the inquiry is usually a simple one. We agree with the government that the inquiry often is simple. Once Urie learned of his affliction, his inquiry was simple. Urie's diagnosis triggered notice of causation which in turn triggered notice to him of negligence on the part of the railroad in allowing a condition to exist which caused workmen to inhale such

In this case, the relationship between injury and causation is neither self-evident nor simple. To deny Kubrick adequate compensation in damages because he did not know, nor in the exercise of reasonable diligence did he find out an element of his cause of action, is to punish him for blameless ignorance. Because of *Urie*'s underlying policies; (1) to prevent the loss of a cause of action because of blameless ignorance and (2) to adhere to the traditional purposes of the statute of limitations which require the assertion of claims in a specified period of time after notice of an invasion of right, that case was not meant to be limited or applied as literally as the Government would have this court believe.

Urie presents this Court with a broad policy which dictates that Kubrick's claim did not accrue until he knew all aspects of his cause of action. Even though Kubrick knew that it was "highly possible" that neomycin caused his deafness, he did not know that the administration of neomycin was negligent. All indications point to the conclusion that Kubrick may never have determined that he had a cause of action unless Dr. Soma so told him.[17] He

16. (Cont'd.)
deleterious substances. In other cases like the case *sub judice*, the inquiry is not simple. It is in these situations that the Urie doctrine must be applied to additional components of a cause of action other than just causation and injury.

17. Although in this case, Kubrick did not know his treatment was negligent until he was told by a physician, we do not assert that in all cases, as the Government intimates at page 20 of its Brief, that potential claimants must wait for doctors to come to them. In fact, here, it was in the course of investigating an erroneous VA report that Kubrick consulted Dr. Soma (Pet. App. 26a-27a). In many cases, the imprimatur of a physician is not necessary in determining negligence; for it would be obvious to a layman. In this case, however, because of the complexity of the drug reaction, only a physician would be able to know that the method of the neomycin administration was negligent. Without Dr. Soma's aid, Kubrick would have been blamelessly ignorant until a physician or other

was blamelessly ignorant of the fact of malpractice. Kubrick's cause of action did not mature or accrue until he learned that Dr. Wetherbee had negligently administered neomycin (Pet. App. 30a-31a; A. 51-55).

Urie must be interpreted to create the accrual of a cause of action when a claimant knows all the aspects of his cause of action. Blameless ignorance of negligence in this medical malpractice case under the FTCA is just as devastating to the plaintiff's knowledge of whether or not he has a cause of action, as was Urie's ignorance of his injury and its cause. To deny Kubrick relief because he did not know of negligence at the time he knew of causation between his hearing loss and neomycin is to punish the blamelessly ignorant.

D. The Discovery Test in *Quinton v. United States*, Like *Urie v. Thompson*, Must Be Interpreted to Include Discovery of Injury, Causation, Duty and Breach of Duty.

Quinton v. United States, 304 F. 2d 234 (5th Circuit 1962) incorporated the "blameless ignorance" doctrine of *Urie v. Thompson, supra*, into its discovery rule for medical malpractice cases under the FTCA. In *Quinton* the plaintiff was given RH positive blood while under treatment at a VA Hospital in 1956; her blood type was RH negative. Not until June 1959 during her pregnancy, did plaintiff learn of the error. In holding that her claim did not accrue until 1959, and in consideration of the *Urie v. Thompson* "blameless ignorance" principle and the

17. (Cont'd.)
medical professional informed him that there had been malpractice. Perhaps he would have had to wait until the VA determined that there had been negligence in 1975 (Pet. App. 30a-31a; A. 51-55). His claim, then, cannot be said to accrue until he is led from blameless ignorance by an expert medical opinion.

uniqueness of medical malpractice situations, the *Quinton* court formulated the following test.[18]

> . . . a claim for malpractice accrues against the Government when the claimant discovered or in the exercise of reasonable diligence should have discovered the acts constituting the malpractice. *Quinton v. United States,* 304 F. 2d 234, 240.

Under the facts of *Quinton,* the claim accrued when Mrs. Quinton discovered that she had been given blood of the wrong type. The Government narrowly reads the discovery test in *Quinton* as meaning that a cause of action accrues under the FTCA when the litigant discovers the cause of the injury. In *Quinton,* when the patient learned she had been given blood of the wrong type, she learned causation and malpractice simultaneously. *Quinton* should not be read literally, as the Government urges.[19] If read literally, the policy reasons underlying *Urie* and *Quinton*

18. The discovery test as enunciated in *Quinton* has been accepted by all of the federal circuits that determine accrual of a cause of action under the FTCA by applying federal law. *Toal v. United States,* 438 F. 2d 222 (2d Cir. 1971); *Tyminski v. United States,* 481 F. 2d 257 (3rd Cir. 1973); *Ciccarone v. United States,* 486 F. 2d 253 (3rd Cir. 1973); *Portis v. United States,* 483 F. 2d 670 (4th Cir. 1973); *Bridgford v. United States,* 550 F. 2d 978 (4th Cir. 1977); *Beech v. United States,* 345 F. 2d 872 (5th Cir. 1965); *Jordan v. United States,* 503 F. 2d 620 (6th Cir. 1974); *DeWitt v. United States,* 593 F. 2d 276 (7th Cir. 1979); *Hulver v. United States,* 562 F. 2d 1132 (5th Cir. 1977); *Brown v. United States,* 353 F. 2d 578 (9th Cir. 1965); *Exnicious v. United States,* 563 F. 2d 418 (10th Cir. 1977).

Only the First Circuit is unrepresented in this list of jurisdictions which follow *Quinton,* because the First Circuit applies state law in its determination of what constitutes "accrual" under the Federal Tort Claims Act. *Hau v. United States,* 575 F. 2d 1000 (1st Cir. 1978). Hau also uses the "discovery test" but determines its use under Puerto Rican law.

19. The *Quinton* decision was written by Chief Judge Tuttle, and Judge Wisdom of the Fifth Circuit Court of Appeals, with Judge Hutcheson concurring. Coincidentally, Judge Wisdom was

will be thwarted and too many cases of blameless ignorance will go without a remedy.[20] Similarly, the policy of granting relief to victims of governmental negligence will not be carried out. This is particularly true of medi-

19. (Cont'd.)
sitting by designation in the Seventh Circuit Court of Appeals and rendered the most recent appellate decision under the *Quinton* test in *DeWitt v. United States,* 593 F. 2d 276 (7th Cir. 1979). The *DeWitt* court held that all elements of a cause of action must be discovered before the statute of limitations accrues. Judge Wisdom in his opinion in *DeWitt* warned against a literal interpretation of *Quinton.* "A literal reading of the Quinton rule would have barred the approaches taken in *Kubrick, Portis* and *Jordan.* These decisions properly recognized that the *Quinton* rule must be flexibly construed to promote the sound policy that 'blameless ignorance' should not result in the loss of the right to assert a malpractice claim." *DeWitt v. United States, supra* at 279.

20. Among those cases where relief has been granted, but would have been denied because of a literal reading of the blameless ignorance rule is *Jordan v. United States,* 503 F. 2d 620 (6th Cir. 1974). There the plaintiff had nose surgery at a VA Hospital in hopes of correcting a sinus condition. Immediately after the operation, he had serious problems with his right eye. In response to his questions concerning his right eye he was told by VA doctors that his problems resulted from muscle damage caused by procedures to deal with the unanticipated severity of the sinus condition. In 1971, he was told "it was too bad they screwed up your eye when they operated on your nose." Jordan, even though he knew that the operation caused his injury, was blamelessly ignorant that the injury was related to malpractice. A case applying state law presents a glaring example of why elements other than causation and harm are necessary in a discovery rule to protect the blamelessly ignorant. The court in *Lopez v. Swyer,* 115 N. J. Super. 237 (1971), aff'd 62 N. J. 267 (1973) granted relief to a woman who knew both causation and harm; but did not know that the harm was related to malpractice. In *Lopez,* the plaintiff had a mastectomy in 1961. After the mastectomy she was given radiotherapy. As a result of the radiotherapy she developed burns and necrotic ulcers. At that point, she knew of her injuries and that radiotherapy had caused them. What she did not know was that there had been malpractice. Not until 1967 did she discover the malpractice. Fortuitously, she overheard doctors discussing her case and one said ". . . and there you see gentlemen what happens when a radiologist puts a patient on the table and goes out and has a cup of coffee." *Lopez v. Swyer,* 115 N. J. Super. 237 (1971). The *Lopez* court found that the cause of action accrued in 1967.

cally complex cases, as the case at bar; where despite his knowledge of his injury and its cause; his ignorance makes him unaware that malpractice has been involved. In many cases, a simplistic, narrow, or literal interpretation of *Quinton* will suffice because, as in *Quinton* itself, knowledge of harm and causation would alert a layman that there has been malpractice.[21]

In the *Quinton* case, the revelation of the cause of the injury and of the malpractice occurred simultaneously. Even in the cases where *Quinton* has been interpreted narrowly, the plaintiff knows all elements of his cause of action before suit.

If the claimant need not know all aspects of his claim on the date of accrual of the action, but only need know causation and injury, he would be forced to abandon all ideas of suing if his investigation does not reveal the relationship within two years. The claimant, who does not

21. In the cases under FTCA, where Federal law has been applied and where *Quinton* has been construed narrowly to define "accrual" as the time when both injury and causation are known; the knowledge of causation and injury automatically alert the plaintiff to the malpractice. *Ashley v. United States,* 413 F. 2d 490 (9th Cir. 1969) (where plaintiff was told before blood was taken that a nerve might be hit and was told after blood was taken that a nerve had been hit; soon after the blood was taken, plaintiff experienced injury); *Brown v. United States,* 353 F. 2d 578 (9th Cir. 1965) (where a baby's parents were told that her vision would be impaired because of the use of oxygen at her birth); *Hulver v. United States,* 562 F. 2d 1132 (8th Cir. 1977); cert. den. 435 U. S. 951 (where an operation resulted in the loss of sexual function and in Hulver's leg being disabled). All of the other federal jurisdictions which apply federal law to determine accrual of a cause of action under the FTCA have accepted the more enlightened and less literal interpretation of the Fifth Circuit's discovery test. *Toal v. United States,* 438 F. 2d 222 (2d Cir. 1971); *Kubrick v. United States,* 581 F. 2d 1092 (3rd Cir. 1978); *Bridgford v. United States,* 550 F. 2d 978 (4th Cir. 1977); *Jordan v. United States,* 503 F. 2d 620 (6th Cir. 1974); *DeWitt v. United States,* 593 F. 2d 276 (7th Cir. 1979); *Exnicious v. United States,* 563 F. 2d 418 (10th Cir. 1977); *Cook v. United States,* M. D. Ga., Civil Action No. 77-6-COL (opinion filed February 21, 1979).

know of the negligence, but who is under the pressure of the rule proposed by the Government, might be forced to bring suit without being aware of negligence and without being aware of who the defendant actually is, just to avoid being barred from suit by the statute of limitations.

To advocate accrual when only causation and injury are known is to leave to chance and the cunning of the plaintiff the discovery of malpractice within two years. Under this scheme, the "lucky plaintiffs" will be those who are aware of the injury and its cause and the apprehension of malpractice is simple and obvious to a layman; the "unlucky plaintiffs" will be those where the malpractice is difficult to ascertain. Where the wrong leg is amputated, the victim will obviously know of the malpractice and can begin suit immediately. In a technically complex drug reaction, as in the instant case, the plaintiff would be forced to investigate causation and injury until he could find malpractice, and hopefully, for the viability of his claim, he would develop a theory of malpractice within two years. Otherwise, his claim would be lost.[22] Congress meant no such inequitable result when it defined the statute of limitations under the FTCA. This is particularly true where the Congressional purpose in enacting the FTCA was to prevent inequitable results as had existed under the private bill system. See 56 Yale L. Rev. 534 (1947).

22. In its brief at pages 19 and 32, the Government discusses the use of discovery procedures in cases of technical complexity. By this statement, the Government seems to be advocating the starting of suit before all aspects of malpractice are known. Knowledge of causation and injury is not enough to sue in tort under the Federal Tort Claims Act. To file suit before a complete cause of action is known to exist would expose defendants to far greater abuses than to define the accrual of a cause of action to include knowledge of injury, causation, duty and breach of duty. To advocate such an approach would be to hold the Government strictly liable for the torts of its employees under the FTCA; that Congress never intended.

E. This Case Compels the Use of a Discovery Test Which Requires That a Plaintiff Know All Aspects of His Cause of Action—Injury, Causation, Duty, and Breach of Duty Before His Claim Accrues.

This case presents a situation where the cause of action is medically complex, and where the plaintiff was hindered in discovering all aspects of his claim by the Veterans Administration and its physicians, and by physicians in the private sector.[23]

23. Several federal medical malpractice cases decided under the FTCA employ a discovery test requiring knowledge of injury, causation, duty, and breach of duty; so as not to deny relief where physicians have deterred claimants from discovery of all aspects of malpractice. In *DeWitt v. United States*, 593 F. 2d 276 (7th Cir. 1979), the plaintiff suffered severe pain after operations on her hand in 1971 and 1972. Physicians assured her that if she followed a regimen of therapy, her hand would improve. She followed a regimen until 1973. The Court held that the District Court's summary judgment based on the statute of limitations was erroneous and remanded the case for a determination of the facts. The standard, the Court said, was whether the plaintiff knew of all aspects of her cause of action—injury, causation, duty and breach of duty, within two years of instituting suit. *Jordan v. United States*, 503 F. 2d 620 (6th Cir. 1974) also employed the four pronged test of injury, causation, duty and breach of duty in declaring that Jordan's cause of action accrued, only when he knew that his eye injury was caused by malpractice. Physicians had led him to believe that his eye injury occurred because extreme measures were necessary during his nose operation to correct his sinus condition. In *Bridgford v. United States*, 550 F. 2d 978 (4th Cir. 1977), the claim did not accrue until the plaintiff discovered malpractice. There, Bridgford complained of pain after a vein stripping operation. Physicians told him there had been an error, but that the error had been corrected. They laid Bridgford's later complaints of pain to emotional problems. In fact, Bridgford's problem resulted from malpractice during his earlier operation; said malpractice was not discovered until years later. In *Tyminski v. United States*, 481 F. 2d 1257 (3rd Cir. 1973), the case most analogous to the case at bar, the veteran there underwent an exploratory operation to determine if he had AVA (Arteriovenus angioma). After the operation, the plaintiff continued to lose control of bodily functions in his lower extremities until he became paraplegic. Physicians at the Veterans Administration and the rating decisions by the VA informed Tyminski that his condition was caused, not by negligence, but by the progression of the AVA.

His failure to discover the fact that malpractice was perpetrated upon him was solely because of blameless ignorance; Kubrick never stopped diligently pursuing his claim (Pet. App. 23a-29a). He did not discover malpractice because his education and employment background did not provide him with the intellectual tools necessary. Even if he had gotten on the right track as to negligence, he was constantly derailed by the representations of the VA and its physicians (Pet. App. 24a-29a).

The questions of causation were so complex that Kubrick had to go to several physicians before Dr. Sataloff revealed that it was "highly possible" that the eighth cranial nerve deafness from which he suffered was as a result of the use of neomycin (Pet. App. 24a). Kubrick was told again and again by the Veterans Administration that only systemic use of neomycin could have caused his deafness; topical use could not have caused it (A. 13-14, 21-22). Then, the VA said that Kubrick's deafness was caused by his work in the machine shop (Pet. App. 26a-27a), and finally said the deafness "may" have been caused by neomycin administration (Pet. App. 25a-26a). Apparently the problem of causation was so complex that many physicians, including those at the VA, could not comprehend it.

The causation problem was apparently not as difficult for the physicians at the Veterans Administration as was their determination of whether the administration of neomycin had been negligent. From 1969 until 1973, the VA told Kubrick that the neomycin administration had not been negligent (Pet. App. 25a-29a). In 1975, the VA reversed its earlier decisions and said neomycin had been negligently administered and that the prior decisions had been clearly erroneous (Pet. App. 30a-31a).

23. (Cont'd.)
The Court held that Tyminski's claim was not barred by the statute of limitations—he had used reasonable diligence to discover the acts constituting malpractice.

It would be patently absurd to require a layman to discover that his treatment had been negligent when the VA physicians believed that the administration of neomycin at the VA had been proper. The VA apparently held to this belief even after they thought that neomycin may have caused Kubrick's deafness. Can a layman be held to a higher standard of knowledge than the reviewing physicians at the Veterans Administration? To determine accrual by the discovery of only injury and causation would require that the layman understand that the method of the application of neomycin was negligent. In reality, Kubrick could not possibly know that unless a physician told him. The physicians he confronted at the VA, did not even agree among themselves as to whether or not there had been malpractice (Pet. App. 25a-29a).

Kubrick was a victim of a "conspiracy of silence" as to causation and negligence perpetrated by the Veterans Administration. The Veterans Administration and their physicians did not reveal malpractice to the plaintiff. In fact, they vehemently denied such malpractice. Although the plaintiff never contended that he was treated negligently in his application to the Veterans Administration for increased benefits under 38 U. S. C. 351, he was gratuitously told on numerous occasions by the Veterans Administration and their physicians that he had no cause of action for medical malpractice (Pet. App. 25a-29a).

The Veterans Administration, including their physicians, continuously denied that Kubrick's hearing loss was caused by the administration of neomycin (Pet. App. 25a-29a). At one point, the VA attributed the hearing loss to Kubrick's work in a machine shop (Pet. App. 26a-27a). On August 9, 1972, the Veterans Administration stated that there "may" have been a connection between neomycin and deafness. Only in 1975, three years after this claim was filed, did the Veterans Administration and its physicians conclude that the respondent's deafness resulted from both the neomycin administration and negligence in that administration and that their earlier decisions had been "clearly and unmistakably erroneous" (Pet. App. 30a-31a; A. 51-55).

Prior to the 1975 revelation, Kubrick was confronted again and again with reports by the Veterans Administration physicians which denied negligence and causation (Pet. App. 25a-29a). As a layman, what was Kubrick to believe, when many physicians and VA officials told him he was not the victim of negligent neomycin administration?

The physicians in the private sector were not of much help to Kubrick in his recognition that he had a malpractice claim. He went to several physicians when he first noticed a hearing problem in 1968; they were unable to diagnose the problem (Pet. App. 23a). Dr. J. J. Soma, whom the plaintiff consulted in 1968, did not tell Kubrick at that time either the causation of his problem or that medical malpractice had been involved (Pet. App. 23a). Only in 1971 did Dr. Soma reveal that not only had neomycin caused the hearing loss, but that it should never have been given (Pet. App. 27a-28a). Dr. Sataloff, who Kubrick saw in 1968, revealed the possible causation of his hearing loss (Pet. App. 23a), but not malpractice in the administration of neomycin (A. 136).

To deny relief to the plaintiff here would be to perpetrate an injustice by punishing a machinist for blameless ignorance, because he failed to understand the technical complexity of the negligence that was perpetrated on him. Such a result would be in derogation of the purposes of the Federal Tort Claims Act; that Act provides for uniform relief to victims of the negligence of government employees.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed; since the respondent's action was commenced within two years of the time he discovered all necessary elements of his claim for medical malpractice.

Respectfully submitted,

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